Supreme Court, U.S.
FILED

97 1891 MAY 26 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1997

JAMIE BABICZ, JENNIFER BABICZ, BY AND THROUGH THEIR PARENTS AND FRIENDS, JEROME BABICZ AND JOYCE BABICZ, JEROME BABICZ, INDIVIDUALLY, JOYCE BABICZ, INDIVIDUALLY,

Petitioners,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FRANK PETRUZIELO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE BROWARD COUNTY PUBLIC SCHOOLS, DANIEL O'KEEFE, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF RAMBLEWOOD MIDDLE SCHOOL, A BROWARD COUNTY PUBLIC SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a student with disabilities seeking relief under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, but who is not entitled to special education under the Individuals with Disabilities Education Act, must nonetheless exhaust the administrative procedures of the Individuals with Disabilities Education Act before filing a lawsuit in the United States District Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jamie Babicz, Jennifer Babicz, Jerome Babicz and Joyce Babicz respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 135 F.3d 1420. The opinion of the district court (App. B, *infra*) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 26, 1998 (App. A., *infra*). The jurisdiction of this court is invoked on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. § 1401(a)(1)(A)
20 U.S.C. § 1415(f)
42 U.S.C. § 12131-32
29 U.S.C. § 794
20 U.S.C. §§ 1400 *et seq.*

REGULATIONS

34 C.F.R. § 300.7(b)(8)
34 C.F.R. § 300.17

The text of the statutory provisions and regulations involved are set out verbatim in Appendix C.

STATEMENT

When this case was filed in May of 1996, Petitioners Jamie and Jennifer Babicz attended Ramblewood Middle School (hereinafter RMS) in Coral Springs, Florida; Jamie in eighth grade and Jennifer in seventh grade. R1-1-2, 3. Both children have suffered from chronic asthma, a respiratory illness that affects breathing and lung capacity, and allergies since they were toddlers. R1-1-3. Additionally, Jamie has migraine syndrome and Jennifer has sinusitis. *Id.* Jamie was enrolled in a class for gifted children and Jennifer in a regular education class. R1-1-2.

As a result of their asthma and other respiratory problems, Petitioners frequently miss school. R1-1-3, 4. In order to keep up with their gifted and regular classwork, tests and quizzes, Petitioners need to have a system in place to receive notice of their assignments and make-up work on a regular basis, so they would not get too far behind in their studies. *Id.* The children also need certain accommodations such as access to inhalers, nebulizers and oxygen, while at school, to medically manage their asthma. *Id.*

Respondents' school system has recognized that Petitioners have disabilities that limit a major life activity and, as such, have written formal accommodation plans for Petitioners, known as Section 504 Plans. R1-1-4, 5. The 504 Plans written for the 1995-96 school year included accommodations for the prevention of asthma attacks and for absences. R1-1-7, 9.

This case arose, in part, from the failure of the personnel at RMS to implement the agreed-upon Section 504 Plans. R1-1-9. Petitioners alleged that the failure to provide these accommodations deprived them of an equal educational opportunity to benefit from the education which the Respondents offered to its non-disabled students. R1-12, R1-13. This case also arose from alleged retaliation which began soon after Jerome and Joyce Babicz retained an attorney to assist in ensuring that Jamie and Jennifer received the protection and accommodations contained in their 504 Plans. R1-1-9-11.

As a result of Respondents' failure to implement the Section 504 Plans by providing accommodations for Petitioners, on May 2, 1996, Petitioners filed suit in the United States District Court for the Southern District of Florida invoking federal court jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202, and requested declaratory, injunctive and compensatory relief for claimed violations of Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. R1-1-14, 15. They made no claim under the Individuals With Disabilities Education Act (IDEA).

The District Court dismissed Petitioners' claims holding that the Individuals with Disabilities Education Act

requires that when one seeks relief under Section 504 and/or the Americans with Disabilities Act, and that relief is also available under the IDEA, one must exhaust the administrative procedures of the IDEA before seeking judicial enforcement of his or her rights under Section 504 and the Americans with Disabilities Act.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the 11th Circuit. On appeal, Petitioners sought reversal of the District Court's decision, arguing that Petitioners' claims were not subject to the exhaustion requirements of the IDEA because they do not meet the IDEA's definition of children with disabilities. For this reason, the minor Petitioners' claims are not cognizable under the IDEA. Consequently, if their claims are not cognizable under the IDEA, the relief sought by Petitioners is not available under the IDEA.

To meet the IDEA's definition of "children with disabilities," a child must have one of the Act's enumerated disabilities *"and . . . by reason thereof, need special education* and related services" 20 U.S.C. § 1401(a)(1)(A) [emphasis added]. Although Petitioners do have one of the disabilities enumerated under the IDEA, they do not need special education under the IDEA. Specifically, providing the children with notice of their assignments, a service included in their 504 plans, does not constitute special education. Rather, the service is a reasonable accommodation under Section 504 and the ADA.

The Eleventh Circuit rejected Petitioners' argument that the IDEA does not apply to them by declaring this

claim to be without merit and affirmed the decision of the District Court.

REASONS FOR GRANTING THE PETITION

The importance of the legal issue in this case should not be obscured by the simplicity of the facts. The petition for certiorari should be granted for the following reasons. The Eleventh Circuit's decision is contrary to this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), to the position of the Office of Civil Rights and the Department of Education Regulations implementing the IDEA and the commentary thereto, 34 C.F.R. § 300.17, misconstrues congressional intent, and forces parties to waste time and money by mandating they employ futile administrative procedures under a law that does not apply to them.

Congress has made it clear that the IDEA does not supersede the rights of a child with disabilities to commence an action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, or the Americans with Disabilities Act of 1990. However, when the relief sought under Section 504 or the ADA is also available under the IDEA – not the case here – a claimant must exhaust the administrative procedures of the IDEA before pursuing other federal remedies. The IDEA so provides

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth, *except* that

> *before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.* 20 U.S.C. § 1415(f) [emphasis added].[1]

As a result of their asthma, Petitioners meet the Section 504 and ADA definition of disability as one "who has a mental or physical impairment that substantially limits a major life activity," 29 U.S.C. § 706(8)(B) (1994); 42 U.S.C. § 12102(2)(A). However, they do not meet the IDEA definition of children with disabilities because they do not require "special education." This is the crux of this case and the crux of the Eleventh Circuit's misapplication of the law.

The IDEA clearly sets forth a two part definition of children with disabilities. The first part of the test is that the student has an enumerated disability (which the Petitioners have).[2] The second part of the test requires that as a result of that enumerated disability the student needs both "special education *and* related services." 20 U.S.C. § 1401(a)(1)(A) [emphasis added]. The Petitioners do not

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[1] In 1997, Congress amended the IDEA. The provisions of section 1415(f) are now found in 1415(1). The only substantive change to 1415(f) is the express inclusion of the ADA in 1415(1).

[2] The Babicz children qualify as children with disabilities because their conditions satisfy the IDEA's definition of "other health impairments" – the first part of the IDEA test – which include "having limited strength, vitality or alertness, due to chronic or acute health problems such as . . . asthma . . . that adversely affects a child's education performance." 34 C.F.R. § 300.7(b)(8) (1997).

meet this definition. Petitioners have consistently asserted there is no showing that they need special education. The IDEA defines "special education" as:

> . . . specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including – (A) [i]nstruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) [i]nstruction in physical education." 20 U.S.C. § 1401(a)(16); *See also*, 34 C.F.R. § 300.17 (1997).

Merely notifying students of their regular class assignments does not constitute "specially designed instruction." Therefore, as the commentary to the Department of Education regulations implementing the IDEA states: "if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act."[3] The Office of Civil Rights also implements this approach, as stated in its 1988 Staff Guidance Memorandum.[4]

Of course, were Petitioners to require "special education," adoption of procedures to ensure that they receive their assignments when they are absent from school

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[3] 34 C.F.R. § 300.17 note 1.

[4] See OCR Staff Guidance Memorandum, Distinctions Between Section 504 and the Education of the Handicapped Act, 131:64-66, October 24, 1988. "The Education for the Handicapped Act," often referred to as Public Law 94-142 was amended in 1990 and renamed "The Individuals with Disabilities Education Act." *See also*, Rothstein, L., *Disabilities and The Law*, 2d Ed., 84 (1997) (The IDEA "only covers children with disabilities who require special education because of their disabilities").

might be construed as "related services." However, as this Court has clearly stated in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), under the IDEA:

> [T]o be entitled to related services, a child must be handicapped so as to require special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act." *Id.* at 894.

This language is crucial. The Petitioners do not need special education. Consequently, the relief which they request is not available under the IDEA. However, the relief they seek does constitute what are known as "reasonable accommodations" under Section 504, *see, School Board of Nassau County v. Arline*, 480 U.S. 273 (1987); *Alexander v. Choate*, 469 U.S. 397 (1979); 34 C.F.R. §§ 104.31-104.39 (1996),[5] and the ADA, 42 U.S.C. §§ 12131 and 12132; 28 C.F.R. § 35.130(b)(7). In fact, this point is tacitly admitted by Respondents' School Board because they provided Petitioners with Section 504 plans. R1-1-4, 5, 7, 9.

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[5] Section 504 has been interpreted to require the recipients of federal funds to provide reasonable accommodations to individuals with disabilities. *School Board Of Nassau County v. Arline*, 480 U.S. 273 (1987); *Alexander v. Choate*, 469 U.S. 287 (1985); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *See*, Laura F. Rothstein, *Disabilities and the Law* 35 (1992); Bonnie T. Tucker & Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* 5:4-5:15 (1992). The Department of Education regulations relevant to public primary and secondary schools are similar to the Department of Education regulations implementing the IDEA. 34 C.F.R. §§ 300 *et seq.* (1996).

In a footnote to its opinion, the Eleventh Circuit held the Petitioner's argument to be "meritless." *Babicz v. School Board of Broward County*, 135 F.3d 1420, 1422 n. 10 (11th Cir. 1998). The Circuit Court did so without referring to *Tatro*, let alone distinguishing the clear language of that case. The Circuit Court opinion did not hold nor suggest that Petitioners met the IDEA's definition of children with disabilities. Nor did it explain how one not covered by a statute could possibly be required to seek relief under that statute.

The Eleventh Circuit characterized the issue as one of first impression in the circuit, and then inexplicably stated that the decision is consistent with the Seventh Circuit's opinion in *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 989 (7th Cir. 1996)[6] and the Second Circuit's opinion in *Hope v. Cortines*, 872 F.Supp. 14 (E.D. N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995).[7]

The Circuit Court misread both cases. The children in *Charlie F.* and *Hope* were, in fact, receiving special education under the IDEA.[8] Petitioners in the instant case were not and are not receiving special education. Therefore, neither case supports the Eleventh Circuit's opinion. Consequently, the Eleventh Circuit's assertion that its decision in *Babicz* is consistent with opinions of other circuit courts is incorrect.

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[6] *Babicz v. School Board of Broward County*, 135 F.3d 1420, 1422 (11th Cir. 1998).

[7] *Id.*

[8] *Charlie F. v. Bd. Of Educ. Of Skokie Sch. Dist.*, 98 F.3d 989 (1996) and *Hope v. Cortines*, 872 F. Supp. 14 (E.D. N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995).

If, when enacting Section 1415(f), Congress had intended to require adherence to the exhaustion requirements of the IDEA, even in cases not covered by the IDEA, it would have so stated. Unlike the IDEA, neither Section 504 nor the ADA requires exhaustion of administrative remedies. To interpret the exhaustion requirements of the IDEA, as the lower courts did, is to hold that when Congress enacted Section 1415(f) of the IDEA it also amended Section 504 and other federal statutes. Such an extraordinary interpretation should only be made based upon clear congressional intent. If allowed to stand, the result of this case will be that children, who neither need nor are entitled to special education, will be forced to go through a futile administrative process under the IDEA for which no relief is available.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5415

D.C. Docket No. 96-6464-CV-KLR

JAMIE BABICZ, JENNIFER BABICZ, by and through their parents and friends, Jerome Babicz and Joyce Babicz, JEROME BABICZ, individually, JOYCE BABICZ, individually,

Plaintiffs-Appellants,

versus

THE SCHOOL BOARD OF BROWARD COUNTY, FRANK PETRUZIELO, in his official capacity as Superintendent of the Broward County Public Schools, DANIEL O'KEEFE, in his official capacity as Principal of Ramblewood Middle School, a Broward County Public School,

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(February 26, 1998)

Before DUBINA and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

In 1996, Appellants Jerome and Joyce Babicz, on behalf of their children, Jamie and Jennifer, filed a civil rights action under 42 U.S.C. § 1983 against the School Board of Broward County, Florida (School Board), Dr. Frank R. Petruzielo (School Superintendent), and Mr. Daniel O'Keefe (Principal), for their alleged failure to provide the Babicz children with equal educational opportunities under Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794,[1] and Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131, *et seq.*[2] On the basis that the Babiczs failed to exhaust their administrative remedies under Section 1415(f)[3] of the

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[1] The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . " 29 U.S.C. § 794.

[2] The ADA provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

[3] This section, titled "Effect on other laws," reads:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 *et seq.*], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, the district court dismissed their complaint (without prejudice) for lack of subject matter jurisdiction.[4] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the time the complaint was filed, Jamie and Jennifer were students at Ramblewood Middle School, a Broward County public school. The sisters have chronic asthma, a respiratory illness affecting their breathing and lung capacity, allergies, migraine syndrome and sinusitis.[5] Understandably, they miss a significant number of school days. Recognizing that Jamie and Jennifer have "disabilities that limit a major life activity," the school issued written formal accommodations for the girls (Section 504 plans).[6] The complaint, seeking compensatory damages and injunctive relief, alleges that the school failed to implement the Section 504 plans and

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> subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(f).

[4] In 1990, Congress changed the name of the Education of the Handicapped Act (EHA), Pub.L. No. 101-476, 104 Stat. 1141 (1990), to the IDEA.

[5] The complaint alleges they are "qualified persons with disabilities" within the meaning of Section 504 and ADA.

[6] While at home, the 504 plans provided the girls with notice of their assignments and make-up work. While at school, the 504 plans provided them with access to inhalers, nebulizers and oxygen to manage their asthma medically.

retaliated against Mrs. Babicz[7] and the girls after they hired an attorney.[8] The district court granted the Appellees' motion to dismiss for lack of subject matter jurisdiction on the basis that the Babiczes failed to exhaust their administrative remedies under Section 1415(f) of the IDEA.

II. STANDARD OF REVIEW

We review the district court grant of the Appellees' motion to dismiss for lack of subject matter jurisdiction *de novo*. *Barnett v. Bailey*, 956 F.2d 1036, 1039 (11th Cir. 1992).

III. DISCUSSION

The issue on appeal is whether the Babiczes must first exhaust their administrative remedies under Section 1415(f) of the IDEA before presenting federal claims regarding the denial of publicly financed special education under Section 504 and the ADA. *See Smith v. Robinson*, 468 U.S. 992, 1009 (1984). While one of first

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[7] The complaint alleges that Mrs. Babicz was forced out of her position as PTA president, was restricted from moving freely within the school, followed sometimes by school personnel, and was denied a visitor's pass on two occasions to attend a pre-arranged teacher conference.

[8] The complaint alleges that both girls entered a school contest sponsored by the National PTA; that the national rules were not followed, and as a result, the girls were excluded from receiving awards. Jamie was accused of plagiarism, was denied a spot on the school's basketball team under suspicious circumstances and was told her mother was not welcome on campus. The complaint alleges that this retaliation resulted in increased asthma attacks.

impression in this circuit, this issue has been thoughtfully considered by both the Second Circuit in *Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995)[9] and the Seventh Circuit in *Charlie F. by Neil F. v. Board of Educ. Of Skokie School District 68*, 98 F.3d 1996). Both circuits concluded that claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the ADA.[10]

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[9] The Second Circuit in essence affirms on the basis of the district court opinion that contains a detailed analysis. *Hope* 872 F.Supp. 14, 18-22 (E.D. N.Y.1995).

[10] Any student who wants "relief that is available under" the IDEA must use the IDEA's administrative system, even if he invokes a_different statute. *Charlie F.*, 98 F.3d at 991. IDEA defines the term "children with disabilities" with two prongs. The first prong includes those suffering from a long list of handicaps and "other health impairments" such as asthma, 20 U.S.C. § 1401(a)(1)(A)(I); *see also* 34 C.F.R. § 300.7(b)(8), and, the second prong includes those, "who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A)(ii). We find the Babicz' argument that they do not fit within the ambit of IDEA as they do not require "special education and related services" as a result of their disabilities, just "related services," to be meritless. Implicit in this legal strategy to avoid IDEA is an apparent desire for compensatory damages not available under IDEA. *See Waterman by Waterman v. Marquette-Alger Intermediate School Dist.*, 739 F.Supp. 361, 365 (W.D. Mich. 1990) ("EHA exhaustion must occur before plaintiffs may file an action under any other federal law seeking relief that is also available under the EHA . . . The fact that plaintiffs seek a particular type of relief . . . not available under EHA . . . is immaterial. To hold otherwise would allow EHA plaintiffs to frustrate Congressional purpose by bypassing the administrative process in virtually every case containing EHA,

Hope, 69 F.3d at 688; *Charlie F.*, 98 F.3d at 992.[11] We agree.

IV.

The district court's dismissal of the Babicz' complaint without prejudice for lack of subject matter jurisdiction is affirmed.

AFFIRMED.

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section 504, or section 1983 damages claims") (citations omitted).

[11] The Seventh Circuit disagreed with the district court over the question of subject-matter jurisdiction. It vacated its judgment and remanded with instruction to dismiss for failure to exhaust IDEA's administrative remedies.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-6464-CIV-RYSKAMP

JAMIE BABICZ and JENNIFER BABICZ, minors by and through their parents and next friends, JEROME BABICZ and JOYCE BABICZ, and JEROME BABICZ and JOYCE BABICZ, individually,

Plaintiffs,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FRANK PETRUZIOLO, in his official capacity as Superintendent of the Broward County Public Schools, and DANIEL O'KEEFE, individually, and in his official capacity as Principal of Ramblewood Middle School, a Broward County Public School,

Defendants.
_____/

ORDER OF DISMISSAL

(Filed Oct. 31, 1996)

THIS CAUSE came before the Court upon defendant's Motion to Dismiss (DE9), filed July 9, 1996, defendants' Motion to Strike (DE 10), filed July 9, 1996, and defendants' Motion to Dismiss Frank Petruzielo and Daniel O'Keefe (DE 11), filed July 9, 1996. Plaintiffs have responded in opposition, and defendants have replied.

BACKGROUND

At the time the Complaint was filed, Jamie Babicz, an eighth grade student, and Jennifer Babicz, a seventh grade student, attended the Ramblewood Middle School ("RMS"), a Broward County public school. According to the Complaint, the sisters share an unfortunate condition – chronic asthma. The severe symptoms, such as allergies, sinusitis, and migraine syndrome, require the girls to miss a significant amount of school. Although it is said that absence makes the heart grow fond, the contrary appears to be true in this litigation. Jamie and Jennifer's repeated absences from school have given rise to sharp tensions between the girls' parents and the RMS administration, tensions which have brought the parties into federal court.

It is unnecessary, at this juncture, to repeat all of the allegations of the Complaint. In summary, the Babiczs claim that defendants denied (and continue to deny) the girls equal educational opportunities on account of their asthmatic condition. Additionally, Mrs. Babicz claims that defendants retaliated against her for seeking to vindicate her daughters' federal rights. According to plaintiffs, defendants' actions give rise to a suit for compensatory damages and injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

Defendants have moved to dismiss on several grounds. In one motion, they seek to dismiss the individual defendants, claiming that they are not suable under the Rehabilitation Act and the ADA. In another motion to

dismiss, defendants claim that the Court should not yet hear this case because plaintiffs have failed to exhaust their administrative remedies. In their final motion, defendants ask the Court to strike certain allegations in the Complaint concerning a PTA mediation, which defendants claim is irrelevant to this case.

LEGAL STANDARD ON A MOTION TO DISMISS

A motion to dismiss should not be granted unless the plaintiff can prove no set of facts in support of its claim entitling it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When considering a motion to dismiss, the Court must accept all the Plaintiff's allegations as true. *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974). Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint need only be "a short and plain statement of the claim," and as long as the pleadings "give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," notice pleading has been satisfied. *Conley v. Gibson*, 355 U.S. at 47.

DISCUSSION

The central issue presented by defendants' motions is whether the Babiczs have properly exhausted their administrative remedies pursuant to the Individuals with Disabilities Education Act ("IDEA"), formerly known as the Education of the Handicapped Act ("EHA").[1] 20

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[1] Although the IDEA only applies to states receiving federal education funds, it is uncontested that Florida has appropriated such funds.

U.S.C. §§ 1400 *et seq.* To the uninitiated, it may seem peculiar to ask whether plaintiffs have exhausted their remedies under the IDEA when they have brought their claims only under the ADA and the Rehabilitation Act. This peculiarity arises from a provision of the IDEA requiring plaintiffs who *could* have brought suit under the IDEA to exhaust their IDEA remedies, even if they have sued under a different provision of federal law:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 *et seq.*], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C.A. § 1415(f). Thus, the IDEA is the exclusive avenue through which disabled children must present their federal claims regarding the denial of publicly financed special education. *See Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

The Babiczs advance two arguments in an attempt to avoid the conclusion that they improperly have failed to exhaust their administrative remedies. First, they assert that their ADA and Rehabilitation Act claims differ substantively from an IDEA claim, and, therefore, that no exhaustion is required. Second, and alternatively, they

argue that Florida has no appropriate administrative procedures in place, which would render futile and attempt at exhaustion. The Court will consider each of these arguments in turn.

Plaintiffs first argue that they are alleging "disability-based discrimination, *i.e.*, that Jamie and Jennifer Babicz were denied benefits equal to those received by students without disabilities solely because of their status as asthmatics." Plaintiff's Opp. Memo. At 3. They further claim that "the definition of 'children with disabilities' under IDEA is limited to certain specified categories which are less encompassing than the definition of disability under Section 504." *Id.* at 4. Jamie and Jennifer are not seeking the sort of special education provided by the IDEA, plaintiffs claim; they are only seeking reasonable accommodations.

Plaintiffs' theory is incompatible with the plain language of the IDEA. The exhaustion requirement is triggered whenever the relief plaintiffs seek is also available under the IDEA. *See* 20 U.S.C. § 1415. In other words, plaintiffs cannot prevail merely by showing that they are seeking relief that is available apart from the IDEA. They must show that they are seeking relief that they *could not get* under the IDEA. *See Waterman v. Marquette-Alger Intermediate School District*, 739 F.Supp. 361, 365 (W.D. Mich.1990) ("EHA exhaustion must occur before plaintiffs may file an action under any other federal law seeking relief that is also available under the EHA."). This they cannot do.

As explained by the Supreme Court, the IDEA "is a comprehensive scheme set up by Congress to aid the

States in complying with their constitutional obligations to provide public education for handicapped children." *Smith v. Robinson*, 468 U.S. at 1009. The Act defines the term "children with disabilities" to include those suffering from a long list of disabilities and "other health impairments." 20 U.S.C. § 1401(a)(1)(A)(i). Despite plaintiffs' protestations, this definition does appear to be broad enough to include Jamie and Jennifer.

Once a child is determined to be disabled, her school must design an individualized education program ("IEP") to meet the child's needs. 34 C.F.R. 300.350; *see also Honig v. Doe*, 484 U.S. 305, 311 (1988). Thus, "[t]he EHA confers upon disabled students an enforceable substantive right to public education in participating states. . . . " *Honig*, 484 U.S. at 310; *see also JSK By and Through JK v. Hendry County School Board*, 941 F.2d 1563 (11th Cir. 1991) (The Act "guarantees that handicapped children will receive a 'free appropriate public education,' 20 U.S.C. § 1412(1), that is 'tailored to the unique needs of the handicapped child by means of an 'individualized education plan' (IEP).' " (quoting *Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 181 (1982)). Jamie and Jennifer are entitled to insist that RMS respond to their special education needs by implementing, for each of them, an IEP which "sets forth, inter alia, the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." *Hope v. Cortines*, 872 F.Supp. 14, 16 (E.D. N.Y.), *aff'd*, 69 F.3d 687 (2d Cir. 1995). If RMS fails to comply in a satisfactory manner, Jamie and Jennifer are entitled to administrative review,

and, failing satisfaction there, to judicial review. What they are not entitled to do is to avoid the administrative mechanism altogether by bringing an action under the ADA and the Rehabilitation Act that could have been brought under the IDEA.

In *Hope*, The Eastern District of New York considered a very similar factual scenario, and, in a well-reasoned and thorough opinion, concluded that plaintiffs were required to exhaust their IDEA administrative remedies, even though they had brought an ADA action. 872 F.Supp. at 14. The Second Circuit affirmed with a brief opinion. 69 F.3d at 687. Plaintiffs cite to *Sullivan v. Vallejo City Unified School District*, 731 F.Supp. 947 (E.D. Cal. 1990) for a different opinion, but the Court finds that case readily distinguishable. In *Sullivan*, a student with cerebral palsy filed a Rehabilitation Act claim, arguing that her school discriminated against her on the basis of her disability by refusing to allow her trained service dog to accompany her to school. *Id.* at 949. The Court held that no exhaustion was required because the plaintiff was not complaining about her education at all. *Id.* at 851. Rather, she was merely complaining that the school had "discriminated against her on the basis of her handicap by arbitrarily refusing her access if she is accompanied by her service dog." *Id.* By contrast, Jamie and Jennifer clearly have complained *about the quality of education* they are receiving by virtue of RMS's refusal to accommodate their disability. This is precisely the sort of case governed by the IDEA, and exhaustion of remedies is therefore required.

Second, plaintiffs offer an alternative argument in another attempt to avoid the dismissal for want of

exhaustion. They argue that Florida does not have an administrative apparatus in place to hear their claims, and (apparently in another alternative argument), that the apparatus that is in place is insufficient to grant the relief requested in the complaint. As to the first argument, the Court notes that if Florida receives federal educational funds (as of course it does), then it has no choice but to implement procedures for administrative review of IDEA claims. *See* 20 U.S.C. § 1415. If the State fails to do so, then it stands to forfeit its federal educational funds. *See* 20 U.S.C. § 1412. Presumably, if the Babiczs attempt to have their complaints heard in the Division of Administrative Hearings and are refused, then they will have exhausted their State administrative remedies and may bring suit in federal court. *See* 20 U.S.C. § 1415(e). The Court will not waive Congress's design for IDEA and related claims in the absence of certain evidence that Florida has disregarded its statutory obligation to provide for administrative review of the claims at issue.

As to the second argument, the Court agrees with the *Waterman* court that "[t]he fact that plaintiffs seek a particular type of relief . . . not available under the EHA . . . is immaterial. To hold otherwise would allow EHA plaintiffs to frustrate congressional purpose by bypassing the administrative process in virtually every case containing EHA, section 504, or section 1983 damages claims." 739 F.Supp. at 365, *citing Brandon E. v. Wisconsin Dept. of Public Instruction*, 595 F.Supp. 740, 745 (E.D. Wis. 1984) (unavailability of EHA damages relief does not alter exhaustion requirement). The administrative system ordained by Congress may not alleviate all of

the Babiczs complaints, and if it does not, then judicial review will be in order. The Court, however, has no authority unilaterally to suspend operation of the IDEA's exhaustion requirement merely because the administrative process may leave plaintiffs wanting. The IDEA requires exhaustion of administrative remedies, whether or not it is congenial to the plaintiffs' claims. The Babiczs have failed to exhaust their administrative remedies, and the Court therefore lacks subject matter jurisdiction to hear this case.

CONCLUSION

The Court has considered the motions, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that:

1. Defendants' Motion to Dismiss (DE 9) be, and the same is hereby **GRANTED**. This cause is hereby **DISMISSED WITHOUT PREJUDICE**. The Clerk of the Court shall Close this Case and Deny all Pending Motions as Moot.

2. Defendants' Motion to Strike (DE 10), and defendants' Motion to Dismiss Frank Petruzielo and Daniel O'Keefe (DE 11), be, and the same hereby are **DENIED AS MOOT**.

DONE and **ORDERED** at the United States District Court, West Palm Beach, Florida this *30* day of October, 1996.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT
JUDGE

Copies to:

Barbara C. Burch, Esq.
Edward J. Marko, Esq.

APPENDIX C

STATUTES:

20 U.S.C. § 1401. Definitions

(a) As used in this chapter –

(1)(A) The term "children with disabilities" means children:

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services.

20 U.S.C § 1415(f) Effect on other laws –

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 *et seq.*] or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1400(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

42 U.S.C. § 12131. Definitions –

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity.

29 U.S.C. § 794 Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

REGULATIONS

34 C.F.R. § 300.1 Purpose

The purpose of this part is ___

(a) To ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs.

34 C.F.R. § 300.7 Children with disabilities

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with §§ 300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including

blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.

(8) "Other health impairment" means having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child's education performance

34 C.F.R. § 300.17 Special Education

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including –

(i) Instructions conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education

Note: The definition of special education is a particularly important one under these regulations, since a child does not have a disability under this part unless he or she needs special education. (See the definition of children with disabilities in § 300.7) The definition of related services (§ 300.16) also depends on this definition, since a related service must be necessary for a child to benefit from special education.

Therefore, if a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

Supreme Court, U.S.
FILED
JUN 25 1998
OFFICE OF THE CLERK

No. 97-1891

In The

Supreme Court of the United States

October Term, 1997

JAMIE BABICZ, JENNIFER BABICZ, BY AND THROUGH THEIR PARENTS AND FRIENDS, JEROME BABICZ AND JOYCE BABICZ, JEROME BABICZ, INDIVIDUALLY, JOYCE BABICZ, INDIVIDUALLY,

Petitioners,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, FRANK PETRUZIELO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE BROWARD COUNTY PUBLIC SCHOOLS, DANIEL O'KEEFE, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF RAMBLEWOOD MIDDLE SCHOOL, A BROWARD COUNTY PUBLIC SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents restate the questions as follows:

1. Whether the claimants must first exhaust their administrative remedies under Title 20 U.S.C. Section 1415(f) of IDEA before presenting federal claims asserting the denial of free and appropriate publicly financed special education under Section 504 and the Americans with Disabilities Act (ADA).

2. Are Petitioners' claims that they were denied a free and appropriate publicly financed special education in middle school moot, where Petitioners are currently receiving services in high school under a different 504 Plan?

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STATEMENT OF THE CASE

Petitioners, Jamie Babicz and Jennifer Babicz, through their parents, filed a suit in the United States District Court for the Southern District of Florida against Respondents, The School Board of Broward County, Florida, ("The School Board"), Dr. Frank R. Petruzielo, Superintendent, and Mr. Daniel O'Keefe, the Principal of Ramblewood Middle School. Petitioners claimed that The School Board denied equal educational opportunities on account of their asthmatic condition, and retaliated against the parents for claiming certain rights on behalf of their daughters. Both students attended Ramblewood Middle School. Presently both students attend school at Taravella High School. The Babiczes sought relief pursuant to 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134.

Respondents moved to dismiss the Complaint based on Petitioners' failure to exhaust administrative remedies as required under IDEA, 20 U.S.C. § 1415(f). The district court dismissed the complaint on that basis, and the Eleventh Circuit affirmed. This petition for a writ of certiorari followed.

The district court accepted the following facts as true as alleged in the Complaint:

1. Jamie Babicz is a fourteen year old eighth grade student in the gifted program at Ramblewood Middle School. Jennifer Babicz is a twelve year old seventh grade

student at Ramblewood Middle School. They are qualified persons with disabilities within the meaning of Section 504 and the ADA.

2. Jamie and Jennifer have been diagnosed since they were toddlers with chronic asthma, a respiratory illness which affects their breathing and lung capacity. Due to asthma attacks, they miss a significant amount of school, which in turn affects their learning. In addition, Jennifer suffers from allergies and sinusitis and Jamie suffers from allergies and migraine syndrome.

3. The Babiczes informed the District that both girls' asthma resulted in frequent and sporadic absences and that they would need accommodations to keep up with their class work and to medically manage their asthma while they were at school.

4. The Babiczes requested that the School Board design a formal plan of accommodations and modifications, referred to as a Section 504 Plan, tailoring the plan that had been followed at their previous school in Maryland.

5. The School Board recommended that Mrs. Babicz complete an application for the School Board's Intermittent Hospital/Homebound program. In this program the instruction in core academic subjects is delivered by telephone at specified times during the day.

6. Jennifer was enrolled in the Intermittent Hospital/Homebound program for the 1994-95 school year but never accessed the program. Jamie's Plan included no provisions for sending home homework assignments and

tests during absences. The Plan is prepared with the input of the parents.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for several reasons: (1) this Court has no jurisdiction over the claims because the claims are moot; (2) the Eleventh Circuit decision is consistent with this Court's decisions and the decisions from other circuits; (3) the remedies pursuant to IDEA are not futile, therefore, petitioners are not exempt from the administrative exhaustion requirements of IDEA. The courts below properly determined that the Individuals with Disabilities Education Act ("IDEA"), formerly known as the Education of the Handicapped Act ("EHA") 20 U.S.C. §§ 1400 *et seq.*, is the exclusive avenue through which Petitioners must present their federal claims regarding the denial of free and appropriate publicly financed special education.

1. PETITIONERS' CLAIMS ARE MOOT

The basis of the mootness doctrine is to ensure that the courts review only those claims that present live disputes. *Allen v. Wright*, 468 U.S. 737 (1984). A claim will be moot if "changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." 13A Charles Alan Wright *et al.*, Federal Practice and Procedure § 3533.3 at 261 (2d ed. 1984).

When this case was filed, both students attended Ramblewood Middle School. Presently both students

attend Taravella High School. The 504 Plans that were prepared for the students in Middle School and which the students claimed were not being followed are no longer in place or binding. Presently, the students have different plans in high school. The students no longer have an interest in the issues raised in the district court; there is no live controversy between the parties. Thus, the issues that were raised in the district court are now moot and this Court has no subject matter jurisdiction over the case.

2. THE ELEVENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER CIRCUITS

The plain language of IDEA mandated the results in the district court and the Eleventh Circuit. The statute states:

> (f) Effect on other laws
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.] or other Federal statutes protecting the rights of children and youth with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 1415(f) (emphasis added). The plain language indicates that a Plaintiff seeking relief that is also available under IDEA, shall exhaust the procedures available under IDEA. The section contains no exceptions. In this case, Petitioners alleged that their rights to "equal educational opportunities" were violated and they sought to have consistent and complete implementation of the Plans. That relief is available under IDEA. Petitioners also sought compensatory damages which are not available pursuant to IDEA. However, the court in *Waterman v. Marquette-Alger Intermediate School District*, 739 F. Supp. 361 (W.D. Mich. 1990) held, "[t]he fact that plaintiffs seek a particular type of relief . . . not available under the EHA . . . is immaterial. To hold otherwise would allow EHA plaintiffs to frustrate congressional purpose by bypassing the administrative process in virtually every case containing EHA, section 504, or section 1983 damages claims." *Id.* at 365; *Association For Retarded Citizens of Alabama, Inc. v. Teague*, 830 F.2d 158, 161 (11th Cir. 1987) (same holding). The right of parents to pursue judicial remedies for their disabled children is conditioned upon the exhaustion of IDEA's administrative procedures. *Id.* Generally claims such as Petitioners' claims pursuant to 42 U.S.C. § 1983 are subject to the requirement of exhaustion of IDEA's administrative procedures. *Smith v. Robinson*, 468 U.S. 992, 1019 (1984). *Manecke v. School Board of Pinellas County, Florida*, 762 F.2d 912 (11th Cir. 1985) (Section 1983, § 504 and the ADA may not be brought until administrative remedies are exhausted); *accord Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996) (holding same for § 1983, § 504 and ADA);

W.G. v. Senatore, 18 F.3d 60 (2d Cir. 1994) (holding same for § 1983 and ADA).

Petitioners also argue vaguely that this case is in conflict with this Court's decision in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984) but never identify why that is so. This Court held that "§ 504 is inapplicable when relief is available under Education of the Handicapped Act to remedy a denial of educational services." *Id.* at 895. This is the same conclusion the lower courts reached in this case. Therefore, there is no conflict between the decisions. In *Tatro*, this Court also held that clean intermittent catherization is a related service as defined by IDEA. The Court noted that only those services necessary to aid a handicapped child to benefit from special education must be provided. *Id.* In this case, the School Board provided Petitioners with a Plan which assisted the students with their class work and which medically managed their asthma while at school. The Intermittent Hospital/Homebound program and other modifications qualify as "related services" pursuant to IDEA because these modifications helped Petitioners benefit from special education.

In addition, the decision below is consistent with the decisions from other Circuits which have dealt with the same issue. As in *Charlie F. v. Board of Education of Skokie School District*, 98 F.3d 989 (7th Cir. 1996), Petitioners are only attempting to present their claim as one pursuant to Section 504 of the Rehabilitation Act or the ADA to bypass the administrative requirements of IDEA. The court in *Waterman v. Marquette-Alger Intermediate School D.*, 739 F. Supp. 361 (W.D. Mich. 1990) stated "EHA exhaustion must occur before plaintiffs may file an action

under any other federal law seeking relief that is also available under the EHA." *Id.* at 365. The case also stated that "[i]n the present case, plaintiff's actions under section 504 of The Rehabilitation Act and Section 1983 seek relief that is also available under the EHA." *Id.* Likewise, the Babiczes sought relief which is also available under IDEA. Moreover, the Eleventh Circuit's ruling is consistent with *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y 1995). As in *Hope*, "[i]n an apparent attempt to circumvent section 1415(f), the [brief] asserts – despite the complaint's allegations detailing the extensive history of special education services sought for and received by [Petitioners] – that 'plaintiff does not need nor desire special education.' " *Id.* at 21. Petitioners, as Plaintiffs in *Hope*, have an extensive history of documented disabilities and special services provided by the School Board as detailed in the Complaint. As in *Hope*, "[Petitioners] thus cannot escape IDEA's exhaustion requirement by drafting a complaint artfully avoiding an IDEA claim where IDEA offers the very relief they seek." *Id.* at 17.

3. THE REMEDIES AVAILABLE PURSUANT TO IDEA WERE NOT FUTILE IN THIS CASE

The administrative remedies in this case were not futile because the Petitioners could have received adequate relief had they timely pursued the administrative avenues. IDEA is the only statute specifically created to address the educational rights of children with disabilities. *Smith v. Robinson*, 468 U.S. 992, 1019 (1984); Title 20 U.S.C. § 1400 *et seq.* Petitioners, by their own admission,

fit the definition of "disability" pursuant to IDEA. *Appellants' Brief* at 12, *Petition for Writ of Certiorari* at 4. Taking the facts in the Complaint as true, Petitioners received special education and related services in the form of Intermittent Hospital/Homebound program and other special accommodations and modifications as specified in the 504 Plans. They complained that the School Board's failure to follow the Plans resulted in the children not obtaining a free and appropriate publicly financed special education. If the administrative remedies had been exhausted, an administrative law judge could have determined whether the School Board was in violation of the Plans and ordered the School Board to make appropriate adjustments if any were required. Petitioners had the obligation to assert their claims to a free and appropriate public education under IDEA before they reach the court system. A procedure that may result in any substantial relief is not futile. *N.B. v. Alachua County School Board*, 84 F.3d 1376, 1379 (11th Cir. 1996).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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FILED
JUL 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1891

In The

Supreme Court of the United States

October Term, 1997

JAMIE BABICZ, JENNIFER BABICZ, BY AND THROUGH THEIR PARENTS AND FRIENDS, JEROME BABICZ AND JOYCE BABICZ, JEROME BABICZ, INDIVIDUALLY, JOYCE BABICZ, INDIVIDUALLY,

Petitioners,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, FRANK PETRUZIELO, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE BROWARD COUNTY PUBLIC SCHOOLS, DANIEL O'KEEFE, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF RAMBLEWOOD MIDDLE SCHOOL, A BROWARD COUNTY PUBLIC SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondents in their "Brief in Opposition to Petition for Writ of Certiorari" raise two new points. First, Respondents assert that "this Court has no jurisdiction over the claims because the claims are moot" and because "there is no controversy between the parties." (Respondents' Brief at 3-4). Respondents' mootness argument misstates the law in two distinct and basic respects. First, their assertion is surprising because, as Respondents acknowledge, one of the forms of relief Petitioners seek is compensatory damages for violations of Title II of the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. This Court has stated on numerous occasions that a case is not moot when there is a viable claim for damages. *City of Richmond v. J.A. Crosson Company*, 488 U.S. 469, 478 (1989); *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8-9 (1978); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Respondents' claim of mootness is based on their assertion that Petitioners no longer attend Ramblewood Middle School and that the original 504 plans in dispute are no longer in effect.[1] (Respondents' Brief at 3-4). Respondents give no indication of how this fact can possibly moot Petitioners' claims for compensatory damages. In support of their mootness

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[1] Respondents' Brief in Opposition makes several references to facts which are not contained in the record, including the present school placement of the minor petitioners. Petitioners do not dispute that they now attend Taravella High School.

claim Respondents cite two sources, neither of which supports their contention that this case is moot. First, in their Brief at page 3, Respondents cite *Allen v. Wright*, 468 U.S. 737 (1984), for the general proposition that "[t]he basis of the mootness doctrine is to ensure that the courts review only those claims that present live disputes." However, the *Wright* case involved standing and its only reference to mootness is in a listing of issues that come under the heading of justiciability. *Id.* at 750.

Respondents also quote from the first sentence to § 3533.3 of 13A Charles Alan Wright *et al.*, Federal Practice and Procedure page 261 (2d ed. 1984) on the general definition of mootness. Respondents, however, fail to mention that on the next page Professor Wright states, "Claims for damages or other monetary relief automatically avoid mootness, so long as the claims remain viable. Damages should be denied on the merits, not on the grounds of mootness." Consequently, Professor Wright and the authority he cites support Petitioners' claim that this case is not moot.

Respondents' mootness argument fails for a second reason. Because minor Petitioners are no longer in middle school but are now attending a high school operated by Respondent Broward County School Board, the appropriateness of accommodations afforded them as a result of their disabilities may arise again and thus falls within the "capable of repetition, yet evading review" exception to the mootness doctrine. In *Western v. Bradford*, 423 U.S. 147, 149 (1975) (per curium), this Court said "in the absence of a class action, the 'capable of repetition, yet evading review' doctrine [is] limited to the situation where two elements combined: (1) the challenged action

was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Both elements of the test are met here. Furthermore, this Court has recognized the applicability of the "capable of repetition, yet evading review" exception to education cases in *Honig v. Doe*, 484 U.S. 305, 317-323 (1988) and *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 186 (1982).

Respondents' discussion of *Hope v. Cortines*, 872 F.2d 14 (E.D. N.Y. 1995) appears to raise a second new point. If Respondents mean to say that any service or accommodation afforded a student with a disability constitutes special education, then Respondents are asking this Court to disregard the distinction between "special education" and "related services" set forth in the IDEA, 20 U.S.C. §§ 1401(12), (15), and (16) and restated in *Irving Independent School District v. Tatro*, 486 U.S. 883 (1984). The effect of Respondents' Argument is to make the ADA and § 504 inapplicable to school children.

Dated: July 21, 1998

Respectfully submitted,

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